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For The Northern Mariana Islands
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9
10 IN THE UNITED STATES DISTRICT COURT
11 DISTRICT OF THE NORTHERN MARIANA ISLANDS

12 ROBERT D. BRADSHAW,

13 Plaintiff,

14 vs.

15 COMMONWEALTH OF THE NORTHERN
16 MARIANA ISLANDS, NICOLE C. FORELLI,
17 WILLIAM C. BUSH, D. DOUGLAS COTTON,
18 L. DAVID SOSEBEE, ANDREW CLAYTON,
19 UNKNOWN AND UNNAMED PERSONS IN
20 THE CNMI OFFICE OF THE ATTORNEY
21 GENERAL, ALEXANDRO C. CASTRO, JOHN
A. MANGLONA, TIMOTHY H. BELLAS,
PAMELA BROWN, ROBERT BISOM, AND
JAY H. SORENSEN,

Defendants.

Case No. 05-0027

**DEFENDANTS' MOTION TO DISMISS
SECOND AMENDED COMPLAINT AND
INCORPORATED MEMORANDUM OF
POINTS AND AUTHORITIES**

[CIV. R. FED. P. 12 (b) (6)]

HEARING: AUG 10 2006
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JUDGE: HON. ALEX R. MUNSON

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MOTION

Now Come, the Commonwealth of the Northern Mariana Islands Attorney General's Office on behalf of Defendants Commonwealth of the Northern Mariana Islands ("CNMI"), Nicole Forelli, William Bush, D. Douglas Cotton and Pamela Brown (hereafter sometimes collectively "Defendants") and move to dismiss Plaintiff Robert D. Bradshaw's Complaint in the above entitled action on the grounds that Plaintiff has failed to state a claim upon which relief can be granted. Defendants submit this motion pursuant to Federal Rule of Civil Procedure 12 (b) (6).¹

PARTIES

Plaintiff Robert Bradshaw is an individual and former Temporary Public Auditor of the CNMI government currently residing in the State of Idaho (hereafter "Plaintiff" or "Plaintiff Bradshaw").

Defendant CNMI is the governmental entity for the Northern Mariana Islands in political union with the United States of America.

Defendant Nicole Forelli is an individual and former employee of the CNMI Attorney General's Office currently residing in the State of Hawaii (hereafter "Ms. Forelli"). Ms. Forelli was employed as an Assistant Attorney General between October 1992 and October 2000, and for a brief time between January 25, 2000 and February 10, 2000 served as Acting Attorney General. Ms. Forelli never represented Plaintiff Bradshaw or communicated with him in any way. *See* Forelli Declaration attached to Motion to Dismiss Amended Complaint.

Defendant D. Douglas Cotton is an individual and former employee of the CNMI Attorney General's Office currently residing in the State of Texas (hereafter "Mr. Cotton"). Mr. Cotton was employed as an Assistant Attorney General from June 10, 1996 to approximately June 10, 1998. *See*

¹ Once properly served, Defendants Clayton and Sosebee will move to join this Motion.

1 Cotton Declaration attached to Motion to Dismiss Amended Complaint.

2 Defendant William Bush is an individual and former employee of the CNMI Attorney
3 General's Office currently residing in Washington, D.C. (hereafter "Mr. Bush"). Mr. Bush was
4 employed as an Assistant Attorney General from July 1997 until September 1999. *See* Bush Contract
5 attached to Motion to Dismiss Amended Complaint.

6 Defendant Pamela Brown was employee of the CNMI government serving in the capacity of
7 Attorney General (hereafter "Ms. Brown"). Ms. Brown was the Attorney General and held this
8 position from December 5, 2003 until January 2006. *See* Brown Declaration attached to Motion to
9 Dismiss Amended Complaint.

10 The aforementioned Defendants shall be referred to collectively as the "AG Defendants."

11 **FACTS**

12 This lawsuit arises as a result of the following facts. In mid-1993 Robert Bisom was hired as
13 legal counsel for the CNMI office of Public Auditor. In November 1993, Plaintiff Bradshaw was
14 appointed as Temporary Public Auditor. On or around December of 1993, Plaintiff Bradshaw caused
15 Mr. Bisom's employment to be terminated.. In 1996, Mr. Bisom filed suit against, among others, the
16 CNMI government and Plaintiff Bradshaw as an individual. On December 6, 1996, Mr. Cotton, in his
17 capacity as an Assistant Attorney General for the CNMI, sent Plaintiff Bradshaw a letter advising that
18 Mr. Bisom had filed suit against Plaintiff Bradshaw and telling him to expect service of a summons
19 and complaint. AGO letter to Bradshaw dated December 6, 1996 attached to Second Amended
20 Complaint. In a handwritten letter to Mr. Cotton dated January 31, 1997, Plaintiff Bradshaw advises "I
21 will not authorize the CNMI to accept service for me at this time." Bradshaw letter to Cotton dated
22 January 31, 1997 attached to Second Amended Complaint. Furthermore, in a letter dated July 14,

1 1999 from Plaintiff Bradshaw to Mr. Bush, in his capacity as an Assistant Attorney General, Plaintiff
2 states:

3 “Some two certified mail packets from an unidentified party came to me from Saipan in
4 1996 and 1997. I refused to accept either of them and they were returned by the Post
5 Office undelivered. Possibly these mailings were an attempt to accomplish service
6 although I cannot be sure what were in the packets and the sender’s name was not
7 identified (beyond a return address post office box). Again, if Bisom wants an answer
8 from me he will have to hire a process server. As I said to Doug Cotton, if am served I
9 will contact the AG to make the answer. Otherwise, I have not authorized the AG to
10 make any answer for me on anything in the CNMI case. And I have never been served.”
11 Plaintiff Bradshaw’s letter to Mr. Bush dated July 14, 1999 ¶ 3 attached to Amended
12 Complaint.

13 Plaintiff Bradshaw goes on to say,

14 “as for as the CNMI SC, **your office has never and should never have represented me**
15 on this at all that I am aware of. As I was never served, **I never asked for any assistance**
16 **and the CNMI SC never should have been told that the AG represents me.**”
17 Bradshaw letter to Mr. Bush dated July 14, 1999 ¶ 9 attached to Amended Complaint.

18 At Plaintiff Bradshaw’s direction and because he never requested PELDIA protection pursuant
19 to 7 C.M.C. §2304 (2000) *et seq.*, the CNMI government was not under any obligation to indemnify or
20 defend Plaintiff.

21 On February 25, 2000, a jury awarded Bisom a one hundred ten thousand three hundred dollar
22 (\$110,300) judgment against the CNMI government and a default judgment totaling one hundred
thirty-nine thousand dollars (\$139,000) for compensatory and punitive damages against Plaintiff
Bradshaw, in his individual capacity. *Bisom v. Commonwealth*, Civil No. 96-1320 (N.M.I. Super. Ct.
2000). Mr. Bisom then appealed to the CNMI Supreme Court requesting that the CNMI government
indemnify Plaintiff Bradshaw and pay Bradshaw’s share of the judgment. *Bisom v. Commonwealth*,
2002 MP 19 (N.M.I Sup. Ct. 2002). The CNMI Supreme Court ruled against Bisom holding that

1 because Plaintiff Bradshaw never requested a defense or indemnification through PELDIA, the CNMI
2 government was under no obligation to defend or indemnify Plaintiff Bradshaw. *Bisom v.*
3 *Commonwealth*, 2002 MP 19 at ¶ 54-57.

4 On or about April 2004, Plaintiff Bradshaw claims he was notified of the judgment against
5 him. Plaintiff then contacted the CNMI Attorney General's Office. The Attorney General's Office
6 responded by sending Plaintiff Bradshaw copies of the various opinions rendered in the *Bisom* case.
7 April 4, 2004 letter from AGO attached to Second Amended Complaint. On or before October 7,
8 2004, the Attorney General's Investigative Unit advised Plaintiff that his allegations of wrong doing in
9 connection with the *Bisom* case were being investigated. October 7, 2004 letter from AGIU attached
10 to Second Amended Complaint. Ms. Brown, in her capacity as Attorney General, then responded to
11 Plaintiff's untimely requests for indemnification in the *Bisom* case by advising Plaintiff that she was
12 bound by the CNMI Supreme Court's holding in *Bisom v. Commonwealth*, 2002 MP 19. Based upon
13 this holding, the CNMI government is not liable for the judgment entered against Plaintiff
14 individually. February 15, 2005 letter from Brown attached to Amended Complaint.

15 In September 2005, Plaintiff moved in CNMI Superior Court to set aside the judgment entered
16 against him. *See Bisom v. Commonwealth*, Civ. No. 96-1320. On December 29, 2005, Judge Lizama
17 of the Commonwealth Superior Court vacated the default judgment against him that served as basis of
18 most, if not all, of Plaintiff's allegations against the Defendants. *See Lizama Judgment* attached.

19 Judge Lizama's opinion goes on to say that Plaintiff Bradshaw and the Commonwealth
20 Attorney General's Office never "consummated" an attorney-client relationship.

21 **PROCEDURAL BACKGROUND**

22 Plaintiff initially filed an action very similar to this action in the U.S. District Court for the

1 District of Idaho on March 7, 2005. Plaintiff then filed a Second Amended Complaint with the U.S.
2 District Court of Idaho on May 18, 2005, which asserted at least seventeen claims under an exhaustive
3 list of federal civil and criminal statutes, including, among others, the Racketeer Influenced and
4 Corrupt Organizations Act (“RICO”), the Immigration Reform and Control Act (“IRCA”) and
5 numerous Federal Civil Rights causes of action.² The action was filed against two Justices of the
6 CNMI Supreme Court, one former Superior Court Judge, and four Assistant Attorneys General
7 because of their participation in the civil matter previously litigated before the CNMI Superior Court.
8 Shortly thereafter, Defendants moved to dismiss Plaintiff’s complaint on several grounds, including
9 the lack of personal jurisdiction. On July 25, 2005, the U.S. District Court of Idaho granted
10 Defendants’ motion to dismiss.³

11 On around September Plaintiff filed this lawsuit on the same, or substantially similar, grounds
12 as the matter dismissed by the U.S. District Court of Idaho. On February 21, 2006, this Court
13 dismissed Plaintiff’s Amended Complaint, but granted Plaintiff leave to file a Second Amended
14 Complaint. Plaintiff’s Second Amended Complaint was filed with this Court on March 30, 2006.

15 STANDARD OF REVIEW

16 *Pro se* litigants are held to the same procedural rules as counseled litigants. *King v. Atiyeh*, 814
17 F.2d 565, 567 (9th Cir. 1987). Dismissal under Federal Rule 12(b)(6) is appropriate when “it appears
18 beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle
19 him to relief.” *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Navarro v. Block*, 250 F.3d 729, 732 (9th
20 Cir.2001). Dismissal is warranted where the complaint lacks a cognizable legal theory or where the
21

22 ² See *Bradshaw v. Commonwealth of the Northern Mariana Islands, et al.*, Case No. CV 05-84-N-EJL (D. Idaho. 2005).

1 complaint presents a cognizable legal theory yet fails to plead essential facts under that theory.

2 *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 534 (9th Cir.1984).

3 In reviewing a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss, the court must
4 assume the truth of all factual allegations and must construe them in the light most favorable to the
5 non-moving party. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-338 (9th Cir.1996). However,
6 legal conclusions need not be taken as true merely because they are cast in the form of factual
7 allegations. *Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir.1987). When ruling on a motion to
8 dismiss, the court may consider the facts alleged in the complaint, documents attached to the complaint
9 and matters of which the court takes judicial notice. *Venetian Casino Resort L.L.C. v. Cortez*, 96
10 F.Supp.2d 1102, 1106 (D.Nev.2000).

11 ARGUMENT

12 Because of the voluminous nature of Plaintiff Bradshaw's complaint and the numerous parties
13 named, one almost needs a scorecard to keep track of the causes of action and against whom they are
14 alleged. Defendants will attempt to keep their analysis of the various counts as simple and succinct as
15 possible.

16 I. As a result of Judge Lizama's December 29, 2005 order vacating the default judgment
17 against Bradshaw, this matter is moot.

18 Now that the default judgment against Plaintiff Bradshaw has been vacated, his alleged injury
19 no longer exists. Therefore, any federal questions over which this Court has subject matter
20

21 _____
22 [Footnote continued from previous page]

³ See *id.* at 10.

jurisdiction are moot.⁴ Whenever an action loses its character as a present live controversy during the course of litigation, federal courts are required to dismiss the action as moot. *In re Di Giorgio*, 134 F.3d 971, 974 (9th Cir.1998). Accordingly, this matter should be dismissed.

As for damages, the money judgment against Plaintiff was vacated and, therefore no longer an issue. With regard to punitive damages, it is possible in 42 USC § 1981 and 1983 cases to recover punitive damages without establishing liability for compensatory or nominal damages, but only if the plaintiff can show that the defendant violated a federally protected right. *Passantino v. Johnson & Johnson Consumer Products, Inc.*, 212 F.3d 493, 514 (9th Cir. 2000). In this instance, Plaintiff has not adequately pled, nor do the facts support, that his federally protected rights were violated.

On the contrary, the precise fact that Plaintiff was able to vacate the judgment against him is proof positive that he received the process he was due and equal protection under the law.

II. Defendants are entitled to immunity.

The universal basis for dismissing each count of Plaintiff's complaint is immunity. There are three kinds of immunity shielding Ms. Forelli, Mr. Bush, Mr. Cotton and Ms. Brown individually from civil liability: absolute judicial, quasi-judicial and qualified immunity.

a. *Absolute Judicial Immunity.*

If a government attorney is performing acts "intimately associated with the judicial phase" of litigation, that attorney is entitled to absolute immunity from damage liability. *Dillman v. Peterson*, 1993 WL 226104, at 5 (N.D. Cal. June 21, 1993) (citing *Flood v. Harrington*, 532 F.2d 1248, 1251 (9th Cir. 1976); *see also Fry v. Melaragno*, 939 F.2d 832, 837 (9th Cir.1991) (stating that if a government

⁴ If this honorable Court rules favorably on Defendants' Motion to Dismiss on the counts over which this Court has subject matter jurisdiction, Defendants will then file a motion to remove this matter to Commonwealth Superior Court on the grounds that the amount in controversy does not exceed \$75,000. *See* 28 U.S.C. § 1332 (2005).

1 attorney is performing acts intimately associated with the judicial phase of litigation in either the civil
2 or criminal context, the attorney is entitled to absolute immunity from civil liability for damages). To
3 varying degrees, Ms. Forelli, Mr. Bush, Mr. Cotton and Ms. Brown's alleged conduct occurred during
4 the judicial phase of litigation involving Plaintiff Bradshaw. As a matter of law, they cannot be held
5 liable.

6 b. *Quasi-Judicial Immunity.*

7 Law enforcement officials are shielded by quasi-judicial immunity when they execute or rely
8 upon a facially valid judicial ruling. *See Roland v. Phillips*, 19 F.3d 552, 557 (11th Cir.1994) (holding
9 that a law enforcement official is protected by absolute quasi-judicial immunity from suit when acting
10 in furtherance of official duties and relying on a facially valid court order, oral or written). Quasi-
11 judicial immunity applies to Ms. Brown, who, in her capacity as Attorney General and in furtherance
12 of her official duties, deferred to the judgments of CNMI Superior Court and its conclusion that
13 Plaintiff Bradshaw was properly served in the Bisom case. *See Brown Declaration* ¶ 4 attached
14 Motion to Dismiss Amended Complaint. Accordingly, all allegations that Ms. Brown is liable for
15 failing to investigate, to Plaintiff's satisfaction, alleged fraud perpetrated on the Superior Court should
16 be dismissed.

17 c. *Qualified Immunity.*

18 Qualified immunity shields public officials from liability if their actions did not "violate clearly
19 established statutory or constitutional rights of which a reasonable person would have known."
20 *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). In analyzing
21 claims of qualified immunity, courts ask, first, if the plaintiff has asserted the violation of any
22 constitutional or statutory right at all, and then assess whether the right was clearly established at the

1 time of defendants' actions. *Siebert v. Gilley*, 500 U.S. 226, 232, 111 S.Ct. 1789, 1793, 114 L.Ed.2d
2 277 (1991).

3 Throughout his complaint, Plaintiff Bradshaw's fails to allege that Ms. Forelli, Mr. Bush, Mr.
4 Cotton and Ms. Brown violated a clearly established statutory or constitutional right. When Plaintiff's
5 argument is boiled down to its core, the underlying theme is that Plaintiff feels he has a statutory and
6 constitutionally protected right to indemnification and a defense. For numerous reasons discussed
7 herein, his conclusion is erroneous. If, on the off chance this Court were to find that Plaintiff was
8 entitled to indemnification, in light of Plaintiff's confusing July 14, 1999 letter to the Attorney
9 General's Office, his right to indemnification was not clearly established. Defendants, thus are entitled
10 to qualified immunity because they did not violate a clearly established law.

11 d. *CNMI's Immunities.*

12 Finally, the CNMI is immune from suit on the basis of its own law unless otherwise permitted
13 by 7 C.M.C. § 2202; and also, immune for suit under 42 U.S.C. § 1983 because the CNMI is not
14 considered a "person" as required by the statute. *See generally Ahmed v. Goldberg*, 2001 WL 1842399
15 (D.N. Mar. I. 2001) (citing *Fleming* and holding that although sovereign immunity does not apply to
16 CNMI, it cannot be sued on the basis of its own law without its consent); *see also Fleming v.*
17 *Department of Public Safety*, 837 F.2d 401, 407 (9th Cir.1988), *overruled on other grounds by*
18 *DeNieva v. Reyes*, 966 F.2d 480, 483 (9th Cir.1992). Though the CNMI's privileges and immunities
19 will be discussed in greater detail throughout this motion, it is worth noting that numerous causes of
20 action simply do not apply to the Commonwealth.

21 III. Plaintiff's RICO, tort and U.S. Constitutional based claims are time-barred.

22 This Court has recognized a four-year statute of limitations for Racketeer Influenced and